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IN THE
COURT OF APPEALS OF INDIANA

JOHN SMITH,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 03A05-0607-PC-383
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-9403-CF-261

March 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John Smith appeals the denial of his petition for post-conviction relief. We affirm.

Issues

Smith raises four issues, which we consolidate and restate as follows:

I. Whether he received ineffective assistance of guilty plea counsel; and

II. Whether the trial court committed reversible error in accepting his guilty plea.

Facts and Procedural History

On March 3, 1994, Smith and five other men committed two separate acts of robbery in Columbus. In the first, they battered a man and stole his wallet in a bar parking lot. Later, they assaulted two other men. One man fled, but the other was stabbed and his wallet stolen. Witnesses identified a gray van at the scene of the first robbery. As police were transporting the victim of the second robbery to police headquarters, they spotted the gray van. The police pulled over the van. The driver and Smith, who was then the only passenger, were arrested for public intoxication. The driver of the van admitted that he was involved in the robberies and implicated Smith and several other men. Smith declined to speak with police.

The police interviewed the men the driver had implicated in the robberies. Five men admitted their involvement in the robberies and all five implicated Smith. On March 9, 1994, the State charged Smith with class B felony robbery. On March 18, 1994, counsel entered her appearance on behalf of Smith. On March 23, 1994, the State charged Smith with a second count of class A felony robbery. Smith initially pled not guilty to both counts. Smith's counsel filed a motion to produce, requesting, *inter alia*, production of the probable

cause affidavit; copies of all police reports including those of the arresting officer, the officers at the scene of the crime or arrest, the investigating officer, the detective; and that the State divulge any evidence that would tend to exculpate Smith. Ex. 16(2). Smith's counsel received the police reports before the guilty plea hearing. Tr. at 13. The police reports show that all five co-defendants implicated Smith as a perpetrator of and significant participant in the robberies.[1] The police reports also show that the two victims and a witness reported that the attackers they saw were black males. Smith is Caucasian. Smith's counsel attempted to interview the victims and witnesses, but was unsuccessful. At the post-conviction hearing, Smith's counsel testified that before she advised Smith to accept a plea agreement, he admitted to her that he was involved in the robberies. Based on the evidence as a whole, she recommended that he accept a plea agreement. *Id*. at 23.

On August 1, 1994, Smith entered into a plea agreement. At the change of plea hearing, the trial court informed Smith of the possible sentencing ranges for class A, class B, and class C felony robberies. Petitioner's Ex. 1, p. 8-9. The trial court also informed Smith that consecutive sentences could be imposed. *Id*. at 13. The State read and explained the charges filed against him. *Id*. at 6. Smith testified that he understood that Indiana law provides that if a person aids, causes, or induces another to commit an offense, that person is considered to have committed the offense. *Id*. at 18.[2] Smith then testified that he knowingly

[1] Smith's failure to paginate his appendices hindered our review. We remind Smith that pro se litigants are held to the same standard regarding rule compliance as are attorneys duly admitted to the practice of law and must comply with the appellate rules to have their appeal determined on the merits. *Gentry v. State*, 586 N.E.2d 860, 860 (Ind. Ct. App .1992).

[2] *See* Ind. Code § 35-41-2-4.

or intentionally took property, a wallet, from another person by force or imminent threat of force. *Id*.[3] He also testified that in a separate incident, he knowingly or intentionally took property, a wallet, from another by use of force or the imminent threat of force, resulting in bodily injury to the person; that is, a stab wound to the chest. *Id*. at 19. The plea agreement indicates that the State originally offered to charge Smith with two counts of class B felony robbery, but Smith's counsel was able to negotiate the charges down to one count of class C felony robbery and one count of class B felony robbery. Petitioner's Ex. 16(2); Tr. at 13. The plea agreement set forth the possible sentencing range for each felony and left sentencing to the trial court's discretion. The trial court took the guilty pleas under advisement until the sentencing hearing.

On October 4, 1994, a sentencing hearing was held. When questioned by the State, Smith denied taking action in either robbery. Petitioner's Ex. 1, p. 68. Upon redirect, Smith's attorney asked him if it was possible that he was trying to minimize his participation in the offenses, and he answered in the affirmative. *Id*. at 73. Smith then admitted that he acted as lookout in the first robbery. *Id*. at 76. He also admitted that he had taken a wallet from the pocket of the second victim. *Id*. at 74. Smith's counsel argued that in determining the appropriate sentence, the trial court should consider that Smith was the least culpable of the perpetrators based on the fact that the victims and a witness told police that all the men they had seen were black. *Id*. at. 83-4, 89. The trial court sentenced Smith to eight years for class C felony robbery, with four years suspended to formal probation, and to twenty years

[3] *See* Ind. Code § 35-42-5-1.

for class B felony robbery, to be served consecutively.[4] The trial court ordered that this sentence be served consecutively to sentences in cases arising in Marion County, Johnson County, and Morgan County. On October 26, 1994, Smith, by counsel, filed a motion to correct erroneous sentence, in which he argued that pursuant to Indiana Code Section 35-50-1-2,[5] the trial court was not permitted to impose consecutive sentences exceeding twenty-five years, and, given that Smith had been ordered to serve an aggregate six-year sentence for convictions in other counties, the sentence for the robbery convictions could not exceed nineteen years. On November 22, 1994, the trial court denied the motion.

On March 19, 2004, Smith filed his third pro se petition for post-conviction relief.[6] On February 23, 2006, a hearing was held on the petition. The State called Smith's guilty plea counsel to testify concerning her representation of Smith. The post-conviction court took the matter under advisement. On June 30, 2006, the post-conviction court issued findings of facts and conclusions thereon and denied Smith's petition for post-conviction relief. Smith appeals.

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[4] Had Smith gone to trial and been convicted as charged, he could have received a maximum sentence of seventy years. Ind. Code §§ 35-50-2-4, -5.

[5] At the time of Smith's conviction, Indiana Code Section 35-50-1-2 provided in relevant part, "The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted."

[6] The post-conviction court permitted Smith to withdraw two previous pro se petitions for post-conviction relief.

Discussion and Decision

Standard of Review

Smith challenges the denial of his petition for post-conviction relief. Our standard of review is well settled:

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). A post-conviction court's findings and judgment will be reversed only upon a showing of clear error–that which leaves us with a definite and firm conviction that a mistake has been made. In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law.

Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004) (citations and quotation marks omitted).

I. Ineffective Assistance of Guilty Plea Counsel

Smith contends that his counsel was ineffective. To prevail on a claim of ineffective assistance, Smith must satisfy a two-prong test:

> First, the defendant must show that the counsel's performance was deficient by falling below an objective standard of reasonableness and the resulting errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced his defense. Prejudice is shown with a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. This reasonable probability is a probability sufficient to undermine confidence in the original outcome of the proceeding.

McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003) (citations omitted). There is a strong presumption that counsel's performance is effective, and a defendant must offer strong and

convincing evidence to overcome this presumption. *Williams v. State,* 771 N.E.2d 70, 73 (Ind. 2002). Counsel's poor strategy, bad tactics, a mistake, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. *Brown v. State,* 698 N.E.2d 1132, 1139 (Ind. 1998). Further, we may dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, if that is the easiest route. *Robinson v. State,* 775 N.E.2d 316, 319 (Ind. 2002).

Here, Smith pled guilty. Where a petitioner pleads guilty and asserts ineffective assistance of counsel, the type of prejudice that must be demonstrated depends upon the type of claim. There are two categories of claims: "(1) an unutilized defense or failure to mitigate a penalty or (2) an improper advisement of penal consequences." *Willoughby v. State*, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001)). Claims that counsel overlooked or impaired a defense require that the petitioner establish that a defense was overlooked or impaired and that there was a reasonable probability of success at trial. *Segura*, 749 N.E.2d at 503; *Reynolds v. State*, 783 N.E.2d 357, 358 (Ind. Ct. App. 2003). Similarly, if the claim involves the failure to mitigate the penalty, the petitioner must show a reasonable probability that the failure would have affected the sentence. *Segura,* 749 N.E.2d at 499. Claims based on an improper advisement of penal consequences require that "a petitioner establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead." *Segura,* 749 N.E.2d at 507; *see also Willoughby,* 792 N.E.2d at 564 (holding that "when an error in advice supports a claim of intimidation by exaggerated penalty, a petitioner must establish specific facts that lead to the conclusion that a reasonable

defendant would not have entered a plea had the error in advice not been committed."). Smith's claims fall into both categories. We first review his claims relating to an unutilized or overlooked defense.[7]

Smith contends that his guilty plea counsel was ineffective in that she failed to interview and/or depose the victims and a witness of the robberies. He claims that this failure "was prejudicial to his defense" because he is Caucasian and the victims and witnesses had made statements to law enforcement officials that the assailants were all black. Appellant's Br. at 4. We fail to discern how counsel's failure to interview the victims and the witness may be deemed prejudicial given the circumstances present here. Smith does not claim that either he or counsel was unaware that these three people had told police that the men they had seen were black. The record clearly establishes that counsel requested and received the police reports before the change of plea hearing and that she discussed all the available evidence with Smith. Thus, this is not a case where further investigation would have revealed additional evidence. *Cf. Smith v. State*, 565 N.E.2d 1114, 1117 (Ind. Ct. App. 1991) (holding that counsel was ineffective where, five years after the initial charges were filed, counsel failed to investigate the availability of key prosecution witnesses). Further, Smith's counsel was able to negotiate a more favorable plea agreement for Smith than the one initially offered by the State. Smith's counsel also presented this evidence at the sentencing hearing in an attempt to mitigate his sentence by arguing that Smith was not the most

[7] For purposes of clarification, we note that claims relating to an impaired or overlooked defense are not limited to affirmative defenses. *Baker v. State*, 768 N.E.2d 477, 483 (Ind. Ct. App. 2002). Rather, the category of claims relating to a defense applies to representation matters in general. *See id*. (applying the *Segura* standard for impaired or overlooked defenses to claims that counsel was ineffective for failing to depose a witness and threatening lax representation unless a plea agreement was signed).

culpable participant. Accordingly, we conclude that Smith has failed to establish that counsel overlooked or failed to utilize exculpatory evidence.[8]

Smith also asserts that his counsel was ineffective in failing to obtain photographs made from a damaged videotape of the second robbery. He claims that the photographs would have established his lack of participation in the second robbery. We disagree. The police record shows that police officers viewed the damaged tape and reported that, "the tape was extremely hard to view at times due to the damage to the tape and the poor camera condition. The tape contains *a portion of the attack* and ends just as [the victim] is thrown to the ground and several of the suspects approached." Ex. 9, p.7 (emphasis added). We are unpersuaded that a few still photographs made from a damaged tape that did not include the robbery in its entirety could establish Smith's lack of participation. Furthermore, at the post-conviction hearing, Smith's counsel testified that she saw the photographs. She also testified that she believed that the negotiated plea agreement allowing Smith to plead guilty to B felony robbery and C felony robbery as opposed to going to trial on the A and B felony robberies was in Smith's best interest. Obviously, Smith's counsel did not believe that the photographs established that Smith was not involved in the robberies. We conclude that

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[8] Smith also fails to carry his burden of demonstrating that there was a reasonable probability of acquittal had he gone to trial. The testimony of the victims and one witness testimony was not likely to exonerate Smith given the evidence as a whole. He does not contend that the victims and the witness would have testified that they were certain that they had actually seen all the men involved in the robberies, and they cannot testify as to what they did not see. In fact, the evidence shows that it is highly unlikely that the victims and the witnesses saw all the participants. One of the victims was unable see without glasses, and his were smashed during the robbery. The witness fled the scene early in the commission of the robbery and only saw three men. Moreover, Smith does not deny that he was present during the robberies, and *all* five accomplices stated that he actively participated in the robberies.

Smith has failed to carry his burden of establishing that there is a reasonable probability that the use of the photographs at trial would have resulted in a more favorable outcome.

Next, Smith contends that his counsel was ineffective in failing to advise him as to the maximum possible sentence he could receive pursuant to the plea agreement. Specifically, Smith asserts that his counsel advised him that the maximum possible sentence he could receive was only nineteen years. The record does not support his assertion. The plea agreement clearly sets forth the range of sentences he could receive. State's Ex. B. The trial court advised Smith as to the sentencing ranges of all classes of felonies. At the post-conviction hearing, Smith's counsel testified that she had no recollection of advising Smith that he could receive no more than a nineteen-year sentence. Tr. at 27. While it is true that Smith's counsel filed a motion to correct error arguing that pursuant to Indiana Code Section 35-50-1-2, the trial court could only sentence Smith to consecutive sentences totaling nineteen years, the fact that she made that argument on his behalf does not, by itself, support a reasonable inference that she so advised Smith, and certainly is insufficient to "establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead." *Segura*, 749 N.E.2d at 507.

II. Acceptance of Guilty Plea

Smith also contends that counsel was ineffective in recommending that he plead guilty while he was maintaining his innocence. Appellant's Br. at 9. However, his argument and citations to authority are based on a different premise; namely, that the trial court commits reversible error where it accepts a plea of guilty when the defendant professes his innocence and there is no independent evidence of guilt. *See Atchley v. State*, 622 N.E.2d 502, 503

(Ind. 1993) ("A trial court may not accept a plea of guilty from one who in the same breath professes innocence."); *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983) ("We hold, as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error."); *Bland v. State*, 708 N.E.2d 880, 881-82 (Ind. Ct. App. 1999) ("A judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time."). He also cites Indiana Code Section 35-35-1-3(b), which provides, "The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." We therefore conduct our review within this framework.

> The factual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial. A finding of factual basis is a subjective determination that permits a court wide discretion which is essential due to the varying degrees and kinds of inquiries required by different circumstances. A factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty. Trial court determinations of adequate factual basis, like other parts of the plea process, arrive here on appeal with a presumption of correctness. We typically review claims of error about pleas under an abuse of discretion standard. This standard is also appropriate where, as here, the Petitioner asks that his plea be set aside through a motion for post-conviction relief on grounds that the factual basis was inadequate.
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> An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State's presentation of evidence on the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges.

Oliver v. State, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006) (citations omitted), *trans. denied*.

Specifically, Smith argues that he maintained his innocence and that there was no factual basis for his guilty plea. We cannot agree. At the change of plea hearing, the State read the charges filed against Smith, and he testified that he understood the nature of the offenses and admitted his participation in the crimes. Our supreme court has held that a defendant's admission of guilt after hearing a recitation of the charges against him can be a sufficient factual basis. *Lowe v. State*, 455 N.E.2d 1126, 1129 (Ind. 1983). Futhermore, at the sentencing hearing, Smith admitted that he was present at the locations of both robberies, that he acted as a lookout in the first robbery, and that he took the wallet from the pocket of the second victim. While he denied that he personally battered and/or stabbed the victims, that denial does not constitute a denial of participating in the robberies. Accordingly, the trial court did not err in accepting Smith's guilty plea.

Affirmed.

SHARPNACK, J., concurs.

SULLIVAN, J., concurs in result.